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IN THE

Supreme Court of the United States

October Term, 1957.

No. 624

ALBERT TOWERS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ALBERT AVERBACH,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Table of Contents.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	4
Statement	4
Reasons for Granting Writ	7
Conclusion	22
Appendix A. Opinion of Circuit Court of Appeals for the Second Circuit	23
Appendix B. 28 U. S. C., Sec. 1254 (1)	29
Appendix C. I. R. C., Sec. 23(e)—(k) (1 and 4)	30

TABLE OF AUTHORITIES.

Campbell v. Comm., 11 T. C. 510	20
Carey, In re, 24 App. Div. (N. Y.) 531	14
Corpus Juris Secundum, Vol. 48, page 1019	14
Davidson v. Comm., 91 F. 2d 516	16
Enger, In re, 1 A. L. R. 2d 1048	9
Foss v. Comm., 75 F. 2d 326	16, 17, 18
Giblen v. Comm., 227 F. 2d 692	20
Halle v. Comm., 175 F. 2d 500	15, 16
Hamlin's Trust v. Comm., 209 F. 2d 761	13
Harrison v. Schaffner, 312 U. S. 579	8, 3, 21
Helvering v. Eubank, 311 U. S. 122	8, 3, 21
Helvering v. Horst, 311 U. S. 112	8, 3, 21
Hubner, Ione C., 28 T. C. 134	3

Page

Life & Fire Ins. Co. of N. Y. v. Wilson's Heirs, 8 Peters 291 12

Maloney v. Comm., 172 F. 2d 638 20
Maryland Casualty Co. v. U. S., 251 U. S. 342 ..... 8, 3
Morgan v. U. S., 298 U. S. 912 ..... 7, 10

Seaside Imp. Co. v. Comm., 105 F. 2d 990 16
Smith, Weldon C. v. Comm., 203 F. 2d 310 ..... 7, 19, 21
Stanton v. U. S., 37 Fed. 252 10
Sullivan, In Re, 143 Cal. 462 15

U. S. v. Yellow Cab Co., 338 U. S. 341 ..... 7, 11

Wainwright v. P. H. & F. M. Roots Co., 176 Ind. 682 15

RULES AND STATUTES.

Tax Court Rule No. 26 9
Tax Court Rule No. 30 9
Tax Court Rule No. 31 9
26 U. S. C., Sec. 116 9

Internal Revenue Act of 1939

Section 23(e) 3, 4
Section 23 (k) (1) 3, 4
Section 23 (k) (4) 3, 4

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ALBERT TOWERS, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	
ALBERT AVERBACH, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners, Albert Towers and Albert Averbach, pray that a writ of certiorari be issued herein to review a judgment of the United States Court of Appeals for the Second Circuit. Said judgment was entered herein on August 2, 1957.

Opinions Below.

The prevailing and dissenting opinions in the Tax Court (R. 4a-64a)[1] are reported at 24 T. C. 199. The opinion

[1] Record references are to the Appendix to taxpayers' brief used below and filed herein

of the Court of Appeals (copy attached hereto), is reported at 247 F. 2d 237.

Jurisdiction.

The judgment of the Court of Appeals was entered August 2, 1957 and jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). Extension of time to file this application to November 29th, 1957, was granted October 31st, 1957, by Associate Justice, John M. Harlan.

Questions Presented.

A writ of certiorari is sought herein to review the following questions:

(1) a Were the petitioners deprived of procedural due process, guaranteed them by the Fifth Amendment to the Constitution of the United States, when, in the absence of direct statutory authority, a non-hearing Judge of the Tax Court, not a member thereof until after the completion of the hearings herein, rendered the majority opinion of that Court and resolved questions in which motive, intent, design and credibility of witnesses were inherent?

(1) b Were stipulations of facts, entered into between the parties and accepted by the hearing Judge, and testimony of petitioners augmenting the stipulations, permitted by the hearing Judge, binding upon the non-hearing Judge?

(1) c Was the non-hearing Judge bound to render his decision in accordance with the underlying principles of law upon which the hearing Judge expressly tried the cases?

(1) d Was the non-hearing Judge in error when he refused to accept certain stipulated facts, augmented by oral testimony, and instead substituted his own beliefs in the matters?

2. Were the unpaid loans made by petitioners to Rumsey Products properly deductible under the Code of Internal Revenue as business bad debts or otherwise?

3. Were the losses of petitioners sustained in "Motor Pool" advances to finance Rumsey Products incurred in a trade or business or in a transaction for profit, under Section 23 (e) or were they business bad debts under Section 23 (k) (l) or nonbusiness bad debts under Section 23 (k) (4)?

4. Is not the holding of the Court of Appeals that when earned income was assigned by petitioners to Rumsey Products for that corporation's credit purposes, the proceeds to be returned when no longer needed, such proceeds, when returned, are taxable to the assignees rather than to the assignor completely incorrect and directly contrary to the decisions of the Supreme Court of the United States in *Helvering v. Eubank*, 311 U. S. 122 and *Harrison v. Schaffner*, 312 U. S. 579 and *Helvering v. Horst*, 311 U. S. 112, as well as *Maryland Casualty Co. v. U. S.*, 251 U. S. 342 and *Ione C. Hubner*, 28 T. C. No. 134, decided Sept. 11, 1957?

5. Were the losses claimed by Albert Towers because of his discharging personal liability as an endorser on certain notes not properly deductible as business bad debts approximately related to his lifetime record of promotional activities?

Statutes Involved.

28 U. S. C. Sec. 1254 (1), Appendix B;
Internal Revenue Code of 1939, Section 23 (e), (k), (l) and (4), Appendix C.

Statement of the Case.

The Tax Court of the United States rendered a decision March 26, 1956, determining that petitioners had deficiencies in Federal Income Tax for the years 1944 through 1947, as follows:

ALBERT TOWERS

1944	$ 1,779.10
1945	$20,711.49
1946	$ 5,025.28
1947	No deficiencies

ALBERT AVERBACH

1944	$ 698.77
1945	$12,551.03
1946	Overpayment
1947	$ 277.60

Taxpayers' cases were consolidated below for hearing with the following:

Samuel Towers, Docket No. 28753[2] and David M. Hayman, Docket No. 28816.[3]

The Tax Court's majority decision was affirmed in all respects by the Court of Appeals.

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[2] Samuel Towers has not sought a Writ of Certiorari herein.

[3] David M. Hayman's appeal to Second Circuit was dismissed upon appeal by stipulation.

Five of the issues raised below are here raised. The facts are not in dispute and were partly made the subject of lengthy stipulations herein.

Taxpayer, Albert Towers, has a lifetime business record of promotional activity. Taxpayer, Albert Averbach, in addition to engaging in promotional activities since 1936, is an attorney at law.

It was stipulated in respect to each petitioner, among other things, that (R. 12a):

> "During the years 1936 to 1947, inclusive, petitioner was engaged in a number of promotional business ventures. He made loans, advances and gave other financial assistance to said ventures in varying amounts. He also spent (*sic*) a great deal of time and effort to (*sic*) the various enterprises. * * *"

Sometime in 1939, with war impending, petitioners, together with Theodore C. Bonney,[4] David M. Hayman and John Balch (now deceased), became interested in a promotional service whereby many of the country's idle machine facilities might be utilized in production of war materials.

The opinion in the Tax Court contained in the petitioners' Appendix below sets forth the various businesses and corporations formed and operated by the petitioners and others, during and after the war years. Two of those corporations which concern us herein were Rumsey Manufacturing Corporation and Rumsey Products, Inc., both New York State corporations. The extensiveness of operation of these corporations is likewise reflected fully in the record below, and Rumsey Manufacturing Corporation conducted its operations at Seneca Falls, N. Y., on three work

[4] Theodore C. Bonney took separate appeal and seeks separate Writ of Certiorari.

shifts, seven days a week with a peak employment of over 850 employees.

During World War II, the petitioners devoted a great deal of their time to the operation of Rumsey Manufacturing and Albert Towers was its vice president and general manager, and Albert Averbach was its vice president and general counsel.

Early in 1947, it became necessary for petitioners to make various short-term loans to Rumsey Products, Inc., to meet pay rolls and later to make advances to a "Motor Pool," organized to finance certain of Rumsey Products, Inc.'s, purchases. By July, 1949, Rumsey Products, Inc., and Rumsey Manufacturing Corporation were adjudged bankrupt and petitioners suffered the various losses claimed herein.

Apart from his activity in the various enterprises aforesaid, Albert Averbach, by evidence, testimony and stipulation, presented to the Tax Court a record of 58 promotional ventures or activities from 1936 to 1953, in many of which he incurred expense or suffered loss in venture investment and loans to ventures, and in laying the groundwork for participation in the active enterprises.

Likewise, Albert Towers, by evidence, testimony and stipulation, presented to the Tax Court a lifetime record of promotional activity in which there was ample proof of his incurring expense and suffering losses in ventures and in loans to ventures and all as part of the pattern of his life's work.

These two petitioners sought to take credit on Income tax for the losses sustained by them from the unpaid loans and from the advances to the "Motor Pool" and likewise treated certain income from the corporation as non-taxable. Albert Towers also sought to deduct his losses as endorser on certain notes for which he was liable for payment and other kindred deductions were taken

by the petitioners arising out of the facts aforesaid, and all of which were disallowed by the Commissioner and the Tax Court and the Court of Appeals.

Certiorari to review the denial of the deductions for losses in loans and advances and the taxation of petitioners as assignees of earned income and the losses of Albert Towers as endorser, plus the denial of procedural due process are principally sought herein.

Reasons for Granting the Writ.

A. The entire proceedings in the Tax Court were conducted and heard by Judge Black. He tried the case on the underlying principle of law in the case of Weldon Smith v. Comm., 203 F. 2d 310. Issues as to motive, intent, design and credibility of witnesses were before Judge Black. Upon his resignation following the close of the hearings, Judge Fisher was appointed to the Tax Court and he rendered the majority opinion in the case. The petitioners were thus deprived of procedural due process of law because Judge Fisher disregarded the full import of the stipulations and testimony before Judge Black and, in a manner amounting to a refusal to give credence to the uncontradicted testimony of petitioners, who he never saw or heard, substituted his own opinion as to stipulated facts, and failed to decide the issues on the underlying principle of law in the Smith case, supra, which had been adopted by Judge Black during the hearings, all of this deprived petitioners of procedural due process and was violative of the Fifth Amendment to the Constitution. It was also contrary to the holdings of this Court in Morgan v. U. S., 298 U. S. 912, that "The one who decides must hear" and in U. S. v. Yellow Cab Co., 338 U. S. 341, that "findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them."

B. The questions presented under Point A, above, have not been finally determined by this Court. From a Federal procedural standpoint, they are highly important both to taxpayers and the Government alike. This Court should finally determine if such procedure is constitutional under the Fifth Amendment to the Constitution.

C. The issues as to the deductibility of the loans to Rumsey Products, Inc., as business bad debts or otherwise under the Code of Internal Revenue have resulted in a Court of Appeals judgment below which is in conflict with holdings of other Courts of Appeals on the same matter and should be finally determined by this Court.

D. The issues as to the deductibility of the "Motor Pool" losses have been resolved in a manner which is in conflict with the decisions of other Courts of Appeals on the same subject and should be finally determined by this Court.

E. The decision of the Court of Appeals in regard to the taxability of petitioners for earned income is in direct conflict with applicable decisions of this Court in Helvering v. Eubank, 311 U. S. 122; Harrison v. Schaffner, 312 U. S. 579; Helvering v. Horst, 311 U. S. 112, as well as Maryland Casualty Co. v. U. S., 251 U. S. 342. This conflict should be finally determined by this Court.

F. The issues as to Albert Tower's losses as endorser were decided in a manner in conflict with decisions of other Courts of Appeals on the same matter and actually is in conflict with the precedent cases of the Second Circuit and the underlying principles of law therein laid down by that Court.

Under POINT A, we believe that the denial of due process to the taxpayers herein is best shown by recourse to the Rules and Statutes affecting the Tax Court. Looking to the Tax Court's Rules of Practice, we find that in Rules 26, 30 and 31, 26 U. S. C. Sec. 1111, references are made to "Hearing Calendars," to "submission without hearing" and to stipulations of agreed facts which may be "presented at the hearing." Further, Section 1116 of 26 U. S. C. contains the following:

> "1116. HEARINGS
>
> Notice and opportunity *to be heard* upon any proceeding instituted before the Tax Court shall be given to the taxpayer and the Commissioner. * * * *Hearings* before the Tax Court divisions shall be open to the public * * *." (Italics ours.)

Judicial interpretation of the word "Hearing" is found in the case of *In re Enger*, 1 A. L. R. 2d 1048, where at page 1055, the following language is used:

> "A requirement of 'hearing' in judicial proceedings, aside from any constitutional requirement of due proce , by common consent presupposes a proceeding before a competent tribunal for the trial of issues between adversary parties, the presentation and consideration of proofs and arguments, and determinative action by the tribunal with respect to the questions raised by the issues presented. *Bowles v. Baer*, 7 Cir., 142 F. 2d 787; *In re Securities and Exchange Comm.*, 2 Cir., 84 F. 2d 316 (reversed on other grounds, 299 U. S. 504, 57 S. Ct. 18, 81 L. Ed. 374); *Keown v. Keown*, 231 Mass. 404, 121 N. E. 153; See, *State ex. rel. Blaisdell v. Billings*, 55 Minn. 467, 57 N. W. 206, 43 Am. St. Rep. 525; *Hurtado v. California*, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *State v. Rose*, 33 Del. 168, 132 A. 864, 45 A. L. R. 85; 12 C. J., Constitutional Law, Sec. 957; 16 C. J.

> S., Constitutional Law, Secs. 567, 568; 12 Am. Jur., Constitutional Law, Secs. 568, 569, 573, 609. The term 'hearing' is usually used in connection with proceedings in equity, and the term 'trial' when the proceeding is at law. *Menard v. Bowman Dairy Co.*, 296 Ill. App. 323, 15 N. E. 2d 1014. Applicable to a 'hearing,' therefore, is the language used in defining the word 'trial' in *State v. Bergman*, 37 Minn. 407, 408, 34 N. W. 737, 738, where we said: 'The word "trial" • • • means the judicial hearing upon the *issues* in a cause for the purpose of *determining it*, • • •' (Italics supplied.)"

Even as the "hearing" contemplated before the Tax Court is one judicial in its nature, so is the determination to be reached after the hearing. The words "hear and determine" refer to judicial determination after the hearing and weighing of testimony on both sides, and do not include *ex parte* matters. *Stanton v. United States*, 37 Fed. 252, page 255:

> "The word 'hearing' when used in connection with the trial of a lawsuit includes not only the *listening to the examination of the witnesses* but the entire judicial examination of the issues, both of law and of fact between the parties, hence the word embraces the *listening to the arguments of counsel* on both sides, if oral arguments are made, and the reading of the arguments if written or printed arguments are presented; and, also, consideration of these arguments in respect to both points of law and of fact. *West Chicago Park Com'rs v. Riddle*, 151 Ill. App. 487." Words and Phrases, Vol. 19, page 167. (Italics ours.)

In *Morgan v. U. S.*, 298 U. S. 468, questions as to procedure and authority of the Secretary of Agriculture to act and determine pursuant to Statute were before this Court. The secretary had statutory power to "determine and prescribe." This Court pointed out that such

a duty is "widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact." Continuing further, this Court stated:

> "The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. *The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.*" (Italics ours.)

Continuing, this Court stated:

> "It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. • • • The duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. *The one who decides must hear.*" (Italics ours.)

Too, in *U. S. v. Yellow Cab Co.*, 70 S. Ct. 177, this Court in commenting upon the proceedings in the court below, stated:

> "The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, *after patient hearing*, that the government's evidence fell short of its allegations • • • The ordinary lawsuit, civil or criminal, normally depends for its resolution on

> which version of the facts in dispute is *accepted by the triers of fact* • • • *National Labor Relations Board v. Pittsburgh Steamship Co.*, 337 U. S. 656, 659, 69 S. Ct. 1283, 1285. • • • Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by *those who see and hear them.* If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court *listened to* and *observed* the officers who made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends." (Italics ours.)

In that same case, this Court, in passing upon the question as to whether the evidence sustains the findings, points out at page 178 that:

> "This issue of fact does not arise upon the trial court's disregard or misunderstanding of some definite and well-established fact. *It extends to almost every detail of the decision,* the Government saying that the trial court 'ignored • • • substantially all of the facts which the Government deemed significant.'" (Italics ours.)

In the light of these pronouncements of this Court, and further enlarging upon the reasons set forth in POINT A in its entirety, we respectfully point out that while the Court of Appeals disposed of this serious procedural question by deeming the contentions of the petitioners to be "utterly without merit," such a conclusion, under the facts and adopted procedure in this case, is directly contrary to the law of the land as set down by this Court.

Perhaps the foundation for any argument, pro or con, on this point, lies in the decision of this Court in *Life & Fire Ins. Co. of New York v. Wilson's Heirs*, 8 Pet. 291, 8 L. Ed. 949, in which this Court stated in substance that theoretically and actually, a "Court", is continuing and

a continuous institution. That statement, applied to the case itself, is quite correct, because the problem to be resolved was one where a lower court Judge had orally granted a judgment and then died. His successor was mandamused to sign the judgment and took the position that he had no such power. This Court directed the signing of the judgment, pointing out that the act required of the successor Judge was purely *ministerial* and that the successor Judge could and should sign the judgment. Noteworthy it is that while some of the dictum in this decision would seem to bestow broad powers upon a successor Judge, our Courts in later cases, have been careful not to approve of a successor Judge's action, unless there has been no harm done to the litigant thereby. In many of those cases there has been no dispute as to facts, or facts have been completely stipulated, and, therefore, the credibility of witnesses or the intent, motive or design of the party were not at issue, and in those cases, particularly in the Tax Court matters, the Circuit Courts have pointed out that issues affecting credibility, or determination on motive, intent or design were not inherent and, thus, no harm resulted to the litigant when a successor Judge rendered a decision. One District Court has been alert to the possible harm resulting from such action and has commented thereupon in manner following in *Hamlin's Trust v. Comm.* (1954), 209 F. 2d 761 (10th Circuit):

> "There is no express requirement in law that the member of the Tax Court who presided at the hearing and observed the witnesses while testifying shall make the findings of fact and write the opinion of the court, and it is not reversible error for one member to conduct the hearing and another member to prepare the findings and write the opinion. *Halle v. Comm.*, 2 Cir., 175 F. 2d 500, certiorari denied 338 U. S. 949, 70 S. Ct. 485, 94 L. Ed. 586.
>
> "Manifestly, where the case turns upon a controverted issue of fact concerning which there is a

> conflict in the oral testimony, the member of the court who observed opportunity to appraise their credibility and determine the weight to be given to their testimony is in a better position to resolve the conflict or conflicts and reach the correct determination of the ultimate facts. But these generalizations are not controlling here for the reason that there was little or no substantial conflict in the evidence relating to the decisive questions of fact."

This statement is indeed different and enlightening when compared to some of the stern holdings that a successor Judge can do no wrong. How careful was this Circuit Court to recognize that controverted issues can prevent action by a non-hearing Judge.

Our State Courts have been generally uniform in their holdings that procedural due process is violated by a successor Judge's similar action in the State Courts. The State Courts adhere firmly to the rule that "*he who decides must hear.*"

Corpus Juris Secundum, Vol. 48, Judges, Sec. 56, page 1019 puts it this way:

> "In the absence of a statute to the contrary, as a general rule a successor judge may not render judgment in a case begun before his predecessor *without a trial de novo.*" (Italics ours.)
>
> "In the absence of a Statute to the contrary, the general rule is that, where a case is tried by a judge, and the facts and issues remain undetermined by him, his successor cannot decide or make findings in the case, *without a trial de novo.*" (Italics ours.)

In re Carey, 24 App. Div. 531 (New York), that Court said:

> "The Constitution (Art. 6, Sec. 3) contemplates that the Judge who has to decide a controverted question of fact should have the advantage of seeing the witnesses and hearing them give their testi-

> mony; and it is a just requirement, one which a sense of propriety commends, that the evidence in a cause when practicable, *be given in the presence of those who are to adjudicate thereon.*" (Italics ours.)

Looking to the law of the State of California, we find that the Supreme Court there, in *In re Sullivan,* 143 Cal. 462, or 77 Pac. 153, where evidence was heard by one judge and another decided, stated as follows:

> "The question presented is, however, not one of jurisdiction, but of the erroneous exercise of jurisdiction. A party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence, where the matter is tried without a jury * * * He cannot be compelled to accept a decision upon the facts from another judge or another jury."

In Indiana, the Supreme Court in *Wainwright v. P. H. & F. M. Roots Co.,* 176 Ind. 682, or 97 N. E. 8, took the following position:

> "A party to an action is entitled to a determination of the issues by the jury or judge that heard the evidence, and where a case is tried by a judge, and the issues remain undetermined at the death, resignation, or expiration of the term of the judge, his successor cannot decide, or make findings in the case *without a trial de novo.*" (Italics ours.)

Seemingly against these cases are Federal adjudications from several Circuit Courts in which a successor Tax Court Judge has given the opinion of the Court. In each case, it is necessary to look to the facts in order to see why it does not apply here.

For instance, in *Halle v. Commissioner,* 175 Fed. 2d 500 (2nd Cir.), Judge Dobie, writing for the Court, upheld such action. However, there were no questions of intent or motive or issues as to credibility of witnesses in the *Halle* case. He was a New York lawyer. He had kept

poor records of his transactions. The evidence was taken from the taxpayer's own books and brokerage house records. He could explain by no genuine evidence large sums of money deposited in his accounts. His answer generally was, "I cannot remember," or "I do not remember," or "I can't tell you." Obviously, with such testimony on the record, he could not have been harmed by the decision of the successor Judge.

In the *Halle* case, Judge Dobie refers to the case of *Seaside Improvement Co. v. Commissioner* (2nd Cir.), 105 Fed. 2d 990, certiorari denied 308 U. S. 618, as added authority for his holding. Looking to the facts in that case, we find that as a preface to his opinion Judge Swan pointed out that "There is no dispute as to the amount of ocean frontage as to which the front foot values were applied." Continuing, he writes, "Findings of fact by the Board are conclusive upon the court if supported by substantial evidence. We regard this principle as applicable even when the findings, because of the expiration of the term of office of the Board's member who heard the testimony are made by his successor in office and, therefore, are based upon a stenographic record of the testimony." Under the issues in the *Seaside* case, *supra*, we cannot find that this statement in any way applies to our case.

Judge Dobie likewise found support in the cases of *Davidson v. Commissioner*, 91 F. 2d 516 (5th Cir.), and *Foss v. Comm.* (1st Cir.), 75 F. 2d 326.

Looking to the *Davidson* case we find that credibility of witnesses was not involved nor was "intent, motive or design." The facts were practically conceded.

In the *Foss* case, *supra*, Judge Morton, while upholding the right of a successor Judge to determine, did point out that "The fact that no member of the Board which

decided the case saw the witnesses *lessens the weight of its findings.*"

He further points out that the Board of Tax Appeals is an administrative body not bound by the rules of procedure which prevail in common law and equity courts and that it is "free to get at the facts in any way which it deems proper, within the bounds of reason and fairness." The holding on this point in the *Foss* case would seem to be sweeping dictum today. The Tax Court is a court of record. True, it may formulate rules for its procedure but such power does not bestow upon it the right to adopt procedures which are violative of the Fifth Amendment to the Constitution, nor do we think it may seek out evidence in any way deemed proper, if such methods are likewise violative of Constitutional rights.

In the *Foss* case, Judge Morton, writing the opinion of reversal of the Tax Board, pointed out that "the report to the Board was made by a member who never saw the witnesses and who misapprehended the testimony which was to be considered in the case." He further held that "*due process had been denied the petitioners.*"

It is evident that in those cases where the Courts of Appeals have upheld the right of the successor Judge to give the opinion of the Court, recourse has not been had to authority in the Supreme Court for such procedure. Rather, support is found in other decisions in the same circuit or in decisions of other circuits. True it is that writs of certiorari have been sought in some of those cases and denied, but such denial is authority under the facts of that particular case and this Court has not, as far as we can find, ever resolved the perplexing question presented by the facts in these cases.

On the questions as to the deductibility of certain loans by the taxpayers, the intent of the taxpayer in making

the loan, the intent of the corporation in receiving the loan were all made the subject of oral testimony by the taxpayers and in the giving of it, much could be learned by the hearing Judge from the witness himself by way of demeanor, candor, honesty in purpose, motive, design and intent. Judge Black had these benefits, and we cannot say that they were immaterial to the determination herein. Perhaps, Judge Black was satisfied after seeing and hearing Mr. Towers and Mr. Averbach that they were telling the truth and that the loans were made in such manner, and for a purpose and in connection with a transaction which would permit their losses to be deductible. Surely, a stranger to the trial would be in no position to make such determination from the bare printed words in the record. If, as this Court has held, "he who decides must hear," and findings of design, motive and intent with which men act depends upon the credit given to witnesses by "those who hear and see them," such procedure has not been followed in our case, and procedural due process has been denied the petitioners, even as it was denied in the *Foss* case, *supra*.

We believe, and earnestly submit, that, under the facts here, the question of procedure in the Tax Court is of such importance in the field of Federal Procedure that it should be resolved by this Court. We further say that when there is involved in a tax case a determination which depends for its validity upon testimony of witnesses as to intent, motive, design and the honesty and credibility of those witnesses, a successor Judge cannot substitute his judgment for that which would have been made by his predecessor. A trial *de novo* should properly be had in those cases to insure a determination which will square up to the constitutional guarantees of the Fifth Amendment.

There also enters into this point the fact that in the record there is ample proof that Judge Black was trying

these cases on the principle of law set down in *Weldon Smith v. Comm.* The parties seemed to be aware of this. Analysis of the cases were made in the light of the *Smith* case. *Evidence was allowed under its holding.* Then the successor Judge seems to have misapprehended these matters of record and decided these cases without hardly a mention of the *Smith* case, and, certainly, contrary to the evidence.

This evidence went to the heart of the petitioners' contentions that their loans and advances were to be repaid and were part of their business pattern. The intent of the taxpayers, their motives and their credibility as determined with the help of seeing and hearing them were highly necessary to back up the stipulations. *Judge Black saw them and heard them. Judge Fisher did not and he gave* little or no credence to the testimony and termed the stipulation as "vague."

Notwithstanding the broad terms of the stipulations, the further proof of business venture and business continuity, and the uncontradicted status of the taxpayers' evidence, Judge Fisher, a complete stranger to these cases until after the hearings were finished, finds that "Petitioners' promotional business ventures were not continuous and unbroken during the entire period 1936-1947." This is in complete disregard of Mr. Towers' and Mr. Averbach's testimony that there was no break in continuity and concrete evidence was allowed by Judge Black to back this up and is undenied on the record.

The Circuit Court below has stamped approval on the law discussed by Judge Fisher and applicable to the questions involved herein and points that such law is in accord with other decisions of the Second Circuit. Each and every one of those cited cases hinges on the continuity of ventures or the number of promotional activities engaged in by the taxpayer.

If number of ventures is some criteria for decision, then we answer this and those cases by saying that if one were to take all the ventures of each taxpayer in those cases in the years in question and place them on one side of a scale and place on the other side the lifetime record of promotional work by Albert Towers undenied and stipulated, plus the 58 conceded ventures of Albert Averbach in eleven years, the scales would quickly dip to a decision for the taxpayers here. If extensiveness and diversity of ventures is to be some part of the test, surely the stipulations for each taxpayer plus his own uncontradicted evidence meet the requirements.

In other circuits, one finds decisions in conflict with the Second Circuit (*Giblen v. Comm.*, 227 F. 2d 692 [5th Cir.]; *Maloney v. Comm.*, 172 F. 2d 638 [9th Cir.]), and in the Tax Court one finds conflict in *Campbell v. Comm.*, 11 T. C. 510. For that matter, the decision here sought to be reviewed is certainly in conflict with the several cases cited by the Second Circuit if number of ventures or extensiveness of business is the test. Actually, there is no clear-cut rule in this matter, nor is there one in any of the other circuits, and this question would seem to be of great importance to taxpayers and to the Government alike. It should be resolved by this Court under the facts of this case, which would permit a making of the law of the land.

Looking at the other side of this picture, assume that Judge Fisher, as successor Judge, had rendered an opinion that he had read the testimony of Mr. Towers and Mr. Averbach and was satisfied that they were telling the truth and were entitled to their deductions. Could not the respondent, and properly so, be heard to declare that this determination, depending upon credibility of witness, was violative of the Fifth Amendment when Judge Fisher had not seen or heard the witnesses? As-

sume that Judge Fisher had stated that he was not going to follow the pattern of the trial and would not consider the case of *Weldon Smith, supra,* and should decide for the petitioners upon some other principle, could not the respondent be heard to declaim that such action was arbitrary and contrary to the pattern of the trial?

Thus we see that these knotty problems can and do effect the taxpayer as well as the Government and are important matters to each in the field of Federal procedure and this Court should decide these questions once and for all.

Briefly adding to POINT E, we say that the Court of Appeals, in holding the petitioners to be taxable for the returned earned income, is in direct conflict with the applicable decisions of this Court in *Helvering v. Eubank, supra; Harrison v. Schaffner, supra; Helvering v. Horst, supra,* and *Maryland Casualty Co. v. U. S., supra.* Those cases all hold that if an assignor assigns a receivable the income is taxable to him, not, as here, to the assignee-petitioner. This is so because this Court in *Helvering v. Horst, supra,* said that though income may be transferred, the incidence of tax may not be shifted from the transferor. The apparent conflict of the Second Circuit in this holding with the firm law of this Court would warrant a review of this part of the case by the Supreme Court.

CONCLUSION.

The departure of the Tax Court from the accepted and usual rule of this Court that "he who decides must hear" constitutes a deprivation of procedural due process. The conflict of decisions on the same subject matter plus the conflict of decision on the same matter with decisions of the Supreme Court entitle petitioners to redress herein. The writ of certiorari should be granted for these reasons.

Respectfully submitted,

ALBERT TOWERS, *pro se.*
ALBERT AVERBACH, *pro se.*

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APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 204, 205, 206, 207—October Term, 1956.
(Argued May 16, 1957 Decided August 2, 1957.)
Docket Nos. 24269, 24270, 24271, 24272

SAMUEL TOWERS,

Petitioner-Appellant,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

And Three Related Cases.

Before:

CLARK, *Chief Judge,*
SWAN and POPE, *Circuit Judges.*

Petition by Samuel Towers, Albert Towers, Albert Averbach and David M. Hayman to review decisions of the Tax Court of the United States determining in a consolidated proceeding, 24 T. C. 199, deficiencies in their respective income taxes for the years 1944 to 1947 inclusive.[1] Affirmative except as to Hayman.[2]

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[1] In the Tax Court the case of Theodore C. Bonney was also consolidated with the cases of the above named petitioners, but in this court Bonney has filed a separate petition for review, and his appeal will be dealt with in a separate opinion.

[2] The Hayman appeal was dismissed on stipulation filed after the argument in this court.

ALBERT AVERBACH, *Attorney for Petitioners.*

CHARLES K. RICE, Assistant Attorney General, Lee A. Jackson, I. Henry Kutz and L. W. Post, Attorneys, Department of Justice, *for Respondent.*

SWAN, *Circuit Judge:*

This petition brings up for review a decision of the Tax Court in a consolidated proceeding originally involving income taxes of five taxpayers for the years 1944 to 1947.[3] The case was heard by Judge Eugene Black, but due to his subsequent resignation from the Tax Court Judge Fisher wrote the opinion. Motions for rehearing, further hearing, and reconsideration were argued, and denied by him. The case was reviewed by the Tax Court and on certain issues there were dissents.[4] On only one of the nine issues decided did the petitioners prevail, namely, "Issue 3." Their appeal seeks a review of the eight other issues. They also contend that they were deprived of procedural due process.

The latter contention is based on the fact that Judge Fisher, who did not hear the testimony, wrote the opinion, which is lengthy and well reasoned. The appellants concede that ordinarily there is no deprivation of due process when a non-hearing judge writes the opinion and makes findings of fact.[5] The claim is that in this case Judge Fisher "ventured his own opinion that loans were not

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[3] See notes 1 and 2, *supra.*

[4] Judges Kern and Herron dissented, without opinion, on Issue 5. Judge Arundell dissented, without opinion, on Issues 4 and 5. Judge Murdock filed a short dissenting opinion.

[5] See *Seaside Improvement Co. v. Commissioner*, 2 Cir., 105 F. 2d 990, 992, cert. denied 308 U. S. 618; *Halle v. Commissioner*, 2 Cir., 175 F. 2d 500, 504, cert. denied, 338 U. S. 949; *Hamlin's Trust v. Commissioner*, 10 Cir., 209 F. 2d 761, 763-764; *Amoroso v. Commissioner*, 1 Cir., 193 F. 2d 583, 586, cert. denied, 343 U. S. 926.

made as testified to," thus disregarding the record and refusing to "give credence to the witnesses." Whether findings of fact by the Tax Court are supported by substantial evidence is open to challenge in reviewing its decision on the specific issues, but the contention that the petitioners were deprived of procedural due process is utterly without merit.

The Tax Court's opinion makes detailed findings as to each of the eight issues which the petitioners assert were decided wrongly. Familiarity with its findings will be assumed without detailed repetition of them. The deficiencies resulted both from denial of deductions claimed under section 23 of the 1939 Code of Internal Revenue as bad debts or losses, and from inclusion of income not reported as such by the taxpayers. The appeal raises mainly questions concerning findings of fact.

Issue 1, as stated by the Tax Court, is whether certain unpaid loans made by several of the petitioners to Rumsey Products, Inc., with which they were variously associated as stockholders, employees, officers and directors, were business bad debts arising from a business of promoting, organizing, managing and financing business enterprises, or were non-business bad debts. They were held to be non-business bad debts in accordance with the provisions of 23(k)(4). The loans were made in June or July 1947 and became worthless in the latter month when the corporation was adjudicated bankrupt.

In the case of each petitioner it was stipulated:

> "During the years 1936 to 1947, inclusive, petitioner was engaged in a number of promotional business ventures. He made loans, advances and gave other financial assistance to said ventures in varying amounts. He also spent [sic] a great deal of time and efforts to [sic] the various enterprises."

It is urged that the Tax Court was bound to accept as true the stipulated facts. But the stipulations were not

so specific as to compel a decision in the taxpayers' favor. A reading of Judge Fisher's opinion will show the careful consideration he gave to the stipulations and the evidence, both oral and documentary, in reaching the conclusion that in 1947 when the debts became worthless the petitioners were not engaged in a business to which the ensuing losses were proximately related. The opinion reviews in great detail the promotional activities of the petitioners during the years referred to in the stipulations. As to the loans involved in Issue 1 it stated:

> "We do not think that for the year 1947 petitioners were, in fact, actively engaged in any business of promoting, organizing, managing and financing in so far as their services to Rumsey Mfg. and Rumsey Products are concerned within the intendment of the rule heretofore stated. *Hadwen C. Fuller, supra.* Nor do we think that the frequent loans to Rumsey Products in the months of June and July of the year in question represented either a business in and of itself, or a part of a business which consisted of promoting, organizing, managing and financing business enterprises. The loans appear to have been merely accommodation advances made from necessity, because of petitioners' practical interest in the company."

We cannot say these findings of fact are clearly erroneous. The law as discussed by Judge Fisher accords with our own decisions.[6]

Issue 2 presents the question whether losses sustained by the petitioners from advances to a "motor pool" created to finance motor purchases of Rumsey Products, were losses incurred in a trade or business or in a transaction entered into for profit, under section 23(e), or were busi-

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[6] See *Commissioner v. Smith*, 2 Cir., 203 F. 2d 310, cert. denied 346 U. S. 816; *Hickerson v. Commissioner*, 2 Cir., 229 F. 2d 631; *Commissioner*, 2 Cir., 229 F. 2d 631; *Commissioner v. Schaefer*, 2 Cir., 240 F. 2d 381; *Wheeler v. Commissioner*, 2 Cir., 241 F. 2d 883; *Putnam v. Commissioner*, 352 U. S. 82.

ness bad debts under section 23(k)(1) or non-business bad debts under section 23(k)(4). The advances were made early in 1947 and were lost in July 1947 upon the corporation's bankruptcy. They were held to be non-business bad debts. In so holding the Tax Court found nothing in the record to suggest that the contributors intended to buy the motors for resale to Rumsey Products or any other purchaser. The petitioners contend that this finding is contradicted by the agreement with Rose Towitz which meant that she was to take title to the goods on which the sight drafts were drawn and as agent for the petitioners was to resell them to Rumsey Products. The agreement, however, provided that during the continuance of the arrangement she might request and receive "a lien upon the motors to which you are rendering such service, * * *; or in the alternative you may request and receive title to such motors, * * *" Thus she was to receive title only upon request and there is no evidence that she ever made such a request.

Issue 3 was decided in the taxpayers' favor. The Commissioner has not appealed and no discussion of this issue is required.

Issue 4 relates to payments of $5,676.30 each, made by Rumsey Manufacturing in 1945 to Albert Towers, Albert Averbach, David M. Hayman and Theodore C. Bonney. They had not reported this as income because they considered the sums received as repayment of loans. The Tax Court, rejecting the Commissioner's treatment of the distribution as a dividend, held it to be the collection of a donated receivable of which the donor's basis was not shown, and consequently the petitioners' basis must be taken as zero and they were accountable for their respective shares as ordinary income. Neither below nor here was any effort made to prove Balch's basis. They also contend that the court below erred in going beyond the issue joined. Judge Murdock's dissent adopted this view. We are unable to agree with it. If right on any theory, the Commissioner's

determination that the payments were income should be sustained by the Tax Court and its affirmance upheld on review.[7]

The question presented by Issue 5 is whether the cash distribution made by Rumsey Manufacturing Co. in 1945 in connection with the retirement of its preferred stock was made in partial liquidation or was essentially equivalent to a taxable dividend. We think Judge Fisher's discussion of this question entirely adequate. The evidence of possible corporate contraction was not such as to compel a contrary result. See *Kirschenbaum* v. *Commissioner*, 2 Cir., 155 F. 2d 23 where, in reliance on *Commissioner* v. *Estate of Bedford*, 325 U. S. 283, we announced our intention to defer to the Tax Court in such cases.

Issue 6 relates to payments by Rumsey Manufacturing Co. in satisfaction of the Barrand and Williams assigned claims. The Tax Court's findings of fact are not clearly erroneous and we are content with its opinion on this issue. Judge Murdock was of opinion that "the remainder of the lump sum payment" should be allocated under the rule of *Cohan* v. *Commissioner*, 2 Cir., 39 F. 2d 540. But the taxpayers do not suggest what method of allocation would be appropriate nor point to any evidence to be relied upon in attempting to make an allocation.

Issue 7 relates to losses claimed by Albert Towers on account of payments made in discharge of his liability as endorser of certain notes. These losses were held to be non-business bad debts for lack of evidence that he was in a trade or business which included as part of its activities the incurring or subsequent payment of these obligations. He argues that his life time business was promoting enterprises but proof is lacking that these particular losses were proximately related to his promotional activities.[8]

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[7] *Helvering v. Gowran*, 302 U. S. 238, 246; *Hormel v. Helvering*, 312 U. S. 552, 558.

[8] See note 6, *supra*.

In Issue 8 the Tax Court held that sums expended in 1947 in the course of unsuccessful proceedings to reorganize Rumsey Products were not deductible as business bad debts or business losses. The findings of fact are not clearly erroneous and the decision must stand.

Issue 9 presents the question whether petitioners are entitled to net operating carry-backs from 1947 to 1945 and 1946 for losses from transactions decided in Issues 1, 2 and 3. We see no necessity of adding to the opinion below on this issue.

Accordingly the decisions are affirmed, except in the case of Hayman whose appeal was dismissed on stipulation.

APPENDIX B.

COURT OF APPEALS; CERTIORARI.

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal cases, before or after rendition of judgment or decree. June 25, 1948 c. 646, 62 Stat. 928, 28 U.S. Code, Sec. 1254 (1).

APPENDIX C.

Internal Revenue Code of 1939:

Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

(e) Losses by Individuals.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; • • •

(k) Bad Debts

(1) General Rule.

Debts which become worthless within the taxable year; or (in the discretion of the Commissioner) a reasonable addition to a reserve for bad debts; and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction. • • • This paragraph shall not apply in the case of a taxpayer, other than a corporation, with respect to a nonbusiness debt as defined in paragraph (4) of this subsection.

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(4) NON-BUSINESS DEBTS

In the case of a taxpayer, other than a corporation, if a non-business debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. The term "non-business debt" means a debt other than a debt evidenced by a security as defined in paragraph (3) and other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business.